No. 86-177

In The

Supreme Court of the United States

October Term, 1986

ANTHONY R. TANNER and WILLIAM M. CONOVER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:

DAVID R. BEST
BEST & ANDERSON
Suite 840
135 West Central Boulevard
Orlando, Florida 32801
(305) 425-2985

For Petitioner
Anthony R. Tanner

RICHARD A. LAZZARA
606 Madison
Suite 2002
Tampa, Florida 33602
(813) 229-2003

For Petitioner
William M. Conover

JOHN A. DeVAULT, III
Counsel of Record

TIMOTHY J. CORRIGAN
BEDELL, DITTMAR,
DeVAULT & PILLANS, P.A.
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

I. SECTION 371, WHICH CRIMINALIZES CONSPIRACIES "TO DEFRAUD THE UNITED STATES," DOES NOT "PLAINLY AND UNMISTAKABLY" EXTEND TO A CONSPIRACY TO DEFRAUD A PRIVATE CORPORATION WHICH IS NEITHER AN AGENCY NOR REPRESENTATIVE OF THE FEDERAL GOVERNMENT AND WHICH HAS NO RELATION TO THE FEDERAL GOVERNMENT EXCEPT THAT IT IS A RECIPIENT OF A FEDERALLY GUARANTEED LOAN ... 1

A. The Government Errs When It Says That Section 371 "Unambiguously" Applies To A Conspiracy To Defaud A Private Corporation And That Prior Cases From This Court Support Extension Of Section 371 Liability To These Petitioners ... 1

B. The Government's Contention That A Section 371 Prosecution Can Lie For A Conspiracy To Defaud A Private Entity If There Is "Substantial Ongoing Federal Supervision" Of The Private Entity Or "Delegation [By The Government] Of A Distinctly Federal Function" To The Private Entity Is Unsupported By The Statute Or Its Rationale. Moreover, There Was No Such Evidence In This Case ... 5

C. If The Court Reverses Petitioners' Section 371 Convictions, It Should Also Reverse The Mail Fraud Convictions ... 9

II. PETITIONERS ARE ENTITLED TO A HEARING TO DETERMINE WHETHER JURORS WERE RENDERED INCOMPETENT TO CONSIDER AND DECIDE THE CASE BY THEIR EXCESSIVE USE OF ALCOHOL AND DRUGS DURING THE PROCEEDINGS ... 9

TABLE OF CONTENTS—Continued

Page

A. Rule 606(b) Does Not Exclude Evidence Of Juror Intoxication During The Course Of The Trial 12

B. The Trial Judge Abused His Discretion In Refusing To Hold An Evidentiary Hearing ... 15

TABLE OF AUTHORITIES

Page

CASES

Clark v. United States, 289 U.S.1 (1933) 10, 18

Dennis v. United States, 384 U.S.855 (1966) 6

Dixson v. United States, 465 U.S.482 (1984) 3, 4

Dowling v. United States, 105 S.Ct.3127 (1985) 2

Haas v. Henkel, 216 U.S.462 (1910) 5, 6

Nye & Nissen v. United States, 336 U.S.613 (1949) 2, 3

Parker v. Gladden, 385 U.S.363 (1966) 18, 19

Perrin v. United States, 444 U.S.37 (1979) 1

Rewis v. United States, 401 U.S.808 (1971) 2

Smith v. Phillips, 455 U.S.209 (1982) 10

Stirone v. United States, 361 U.S.212 (1960) 9

United States v. Carpenter, 791 F.2d 1024 (2d Cir.), *cert. granted*, 107 S.Ct.666 (1986) 2

United States v. Conover, 772 F.2d765 (11th Cir.1985) 4

United States v. Hay, 527 F.2d 990 (10th Cir.1975), *cert.denied*, 425 U.S.935 (1976) 4

United States v. Lampkin, 66 F.Supp.821 (S.D.Fla. 1946) 18

United States v. Porter, 591 F.2d 1048 (5th Cir.1979) .. 5, 9

Vaise v. Delaval, 1 T.R.11, 99 Eng.Rep.944 (K.B. 1785) 11, 12

Williams v. United States, 458 U.S.279 (1982) 2

CONSTITUTION OF THE UNITED STATES

Amendment VI 10, 12, 18

Page

UNITED STATES CODE

18 U.S.C.§ 371 (1982) ..... Passim
28 U.S.C.§ 1865(b)(4) (1982) 11

RULES

Fed.R.Evid.606(b) 12, 13, 14, 15
Local Rule 2.04(c), United States District Court for the Middle District of Florida 16, 17

MISCELLANEOUS

8 J.Wigmore, Evidence § 2354 (McNaughton rev.ed.1961) 12
3 D.Louisell and C.Mueller, Federal Evidence (1979) 11, 12, 15
3 J.Weinstein and M.Berger, Weinstein's Evidence (1985) 12
C. Dickens, *The Pickwick Papers* (N.Y.Heritage Press 1962) 10
Preliminary Draft of Proposed Rules of Evidence, 46 F.R.D.161 (1969) 12, 13
117 Cong.Rec.33,641 (1971) 13
117 Cong.Rec.33,648 (1971) 13
119 Cong.Rec.21,405 (1973) 13
Rules of Evidence, Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Session (1973) 14

TABLE OF AUTHORITIES—Continued

Pages

Rules of Evidence (Supplement), Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 1st Session (1973) 14
H.R.Rep.No.650, 93d Cong., 1st Session (1973) 14
120 Cong.Rec.2,375 (1974) 14
S.Rep.No.1277, 93d Cong., 2d Session (1974) 15
S.Conf.Rep.No.1597, 93d Cong., 2d Session (1974) 15

I

SECTION 371, WHICH CRIMINALIZES CONSPIRACIES "TO DEFRAUD THE UNITED STATES", DOES NOT "PLAINLY AND UNMISTAKABLY" EXTEND TO A CONSPIRACY TO DEFRAUD A PRIVATE CORPORATION WHICH IS NEITHER AN AGENCY NOR REPRESENTATIVE OF THE FEDERAL GOVERNMENT AND WHICH HAS NO RELATION TO THE FEDERAL GOVERNMENT EXCEPT THAT IT IS A RECIPIENT OF A FEDERALLY GUARANTEED LOAN.

A. The Government Errs When It Says That Section 371 "Unambiguously" Applies To A Conspiracy To Defraud A Private Corporation And That Prior Cases From This Court Support Extension Of Section 371 Liability To These Petitioners.

The government's position is based upon an erroneous premise: that Section 371 "unambiguously" (GB 26) extends to a conspiracy to defraud a *private corporation* which has *no* connection to the federal government except that it is a recipient of a federally guaranteed loan. The face of Section 371 prohibits conspiracies to "defraud the *United States* or any *agency* thereof." Seminole is obviously neither "the United States" nor an "agency thereof,"[1] and the government does not contend otherwise.[2] Thus, the language of Section 371 simply does not reach a conspiracy to defraud a private corporation. *See Perrin v. United States*, 444 U.S.37, 42 (1979) (in determining reach of criminal statute, this Court first looks to the language of the statute itself).

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[1] *See* PB 18-19, n.8. ("PB —" refers to petitioners' main brief. "GB —" refers to the government's brief).

[2] The government does argue that Seminole was "an intermediary" of the federal government (*e.g.*, GB 21), but the term "intermediary" appears nowhere in the language of Section 371. Moreover, as demonstrated *infra* pp. 5-9, the government's designation of Seminole as an "intermediary" is a mischaracterization of Seminole's relationship with the federal government.

The government also completely ignores the legislative history (or lack thereof) of Section 371, perhaps because the legislative history *gives absolutely no indication* that Congress envisioned that Section 371 would apply to a conspiracy to defraud a private entity (PB 18-20). However, this Court *should* look to congressional intent concerning Section 371, as it routinely does to determine the scope of a federal criminal statute. *E.g., Dowling v. United States,* 105 S.Ct.3127, 3134 (1985). Where, as here, the legislative history is "limited," this Court considers "what Congress did not say." *Rewis v. United States,* 401 U.S. 808, 811-12 (1971). The scant legislative history of Section 371 gives no hint that Congress intended that conspiracy "to defraud the United States or any agency thereof" would also mean "conspiracy to defraud a private corporation which receives a federally guaranteed loan." At minimum, the uncertainty of the applicability of Section 371 to the conspiracy charged here is sufficient to invoke the rule of lenity "consistent with [this Court's] usual approach to the construction of criminal statutes." *Williams v. United States,* 458 U.S.279, 290 (1982) (*see* PB 25-28).[3]

Neither does the government find any comfort from this Court's prior decisions construing Section 371. In particular, the government cites *Nye & Nissen v. United States,* 336 U.S.613 (1949) to support the proposition that Section 371 encompasses fraud "when the immediate object of the fraud is an intermediary which . . . is in effect

[3] Similar issues concerning whether breaches of a private corporation's work rules can constitute a federal crime under the federal mail and wire fraud statutes are presented in another case accepted by this Court. *United States v. Carpenter,* 791 F.2d 1024 (2d Cir.1986), *cert. granted,* 107 S.Ct. 666 (No. 86-422, 1986 Term). *See* Brief for Petitioners at 28-38, *Carpenter v. United States,* No. 86-422.

acting on behalf of the federal government" (GB 21). However, *Nye & Nissen* does not contain this or any similar language and does not even involve a construction of Section 371, but rather whether the petitioners, who were part of a conspiracy to directly defraud the Army, Navy and War Shipping Administration (a federal agency), could also be convicted of the substantive crime of filing false claims. *Id.* at 616, 618.

The government also relies upon decisions of this Court construing unrelated statutes (GB 22). Only one, *Dixson v. United States,* 465 U.S.482 (1984), merits discussion, not only because it is extensively cited by the government (GB 22, 23 n.13, 24, 25, 26, 27), but also because, by contrast, it makes petitioners' point. In *Dixson,* the Court considered whether officers of a private corporation administering federal community development funds were "public officials" under the federal bribery statute. *Id.* at 484. The Court first determined that "the language of [the statute] does not decide the dispute." *Id.* at 491:

> "We must turn, therefore, to the legislative history of the federal bribery statute to determine whether these materials clarify which of the proposed readings is consistent with Congress' intent. *If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases."* *Id.* (emphasis supplied) [citing *Rewis v. United States,* 401 U.S.808, 812 (1971)].

This Court in *Dixson* reviewed the extensive legislative history of the federal bribery statute, *id.* at 491-98, and concluded that Congress, by "explicitly" endorsing prior judicial decisions concerning the scope of the statute, had "intended [the statute] to cover local officials like petitioners." *Id.* at 496, 497. However, the Court, in limiting its holding, stated that *"the mere presence of some*

federal assistance" would *not* be enough to make a local employee a "public official" under the statute. *Id.* at 499 (emphasis added).[4] Notably, four members of the Court dissented in *Dixson*, finding both the language and legislative intent of the statute ambiguous and concluding that the rule of lenity required an interpretation of the statute favorable to the petitioners. *Id.* at 501 (O'Connor J., dissenting).

Here, like the federal bribery statute in *Dixson*, the language of Section 371 does not on its face prohibit petitioners' conduct. However, unlike *Dixson*, there is *no* legislative history of Section 371 which would permit this Court to find that Congress intended that the words "conspiracy to defraud the United States or an agency thereof" should be extended to a conspiracy to defraud a private corporation receiving a federal loan. "Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interest in non-federal programs or entities. Because it has not done so here, Section 371 should not be construed to reach [petitioners'] acts" (Pet.App.21-22) (Hill, J., specially concurring) (footnote omitted).[5]

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[4] This is consistent with Judge Hills' statement below that Section 371 should not be held to reach conspiracies to defraud private entities receiving a federal loan which entails only a "modicum of federal supervision" (Pet. App.20) (Hill, J., specially concurring).

[5] The government cites "numerous court of appeals decisions" which it says uphold Section 371 prosecutions "when the immediate object of the fraud has been a non-federal public or private intermediary responsible for administering a federally sponsored program" (GB 22; *see also id.* at 23, 27). However, every court of appeals decision cited by the government (save one, *United States v. Hay*, 527 F.2d 990 (10th Cir.1975), *cert. denied*, 425 U.S. 935 (1976), which is otherwise distinguishable) involves fraud upon a *governmental agency, state or local, administering a federal government program.* In these circumstances, the defrauded governmental agency *is* acting as an

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B. The Government's Contention That A Section 371 Prosecution Can Lie For A Conspiracy To Defraud A Private Entity If There Is "Substantial Ongoing Federal Supervision" Of The Private Entity Or "Delegation [By The Government] Of A Distinctly Federal Function" To The Private Entity Is Unsupported By The Statute Or Its Rationale. Moreover, There Was No Such Evidence In This Case.

The government rightly concedes that Seminole was neither "the United States" nor "an agency thereof" and that the alleged conspiracy was directed toward Seminole (*e.g.*, GB 11). However, seeking to find some basis to bring a conspiracy to defraud Seminole within Section 371, the government argues variously that Seminole was a federal government "intermediary" (GB 23), that Seminole was "in effect acting on behalf of the federal government" (GB 21) and that the Seminole construction project was "an essentially federal program" (GB 27). None of these characterizations, even if true (which they are not), would support a Section 371 prosecution because they find no support in the wording or meaning of the statute. Similarly, the government's reliance upon *Haas v. Henkel*, 216 U.S.462, 479 (1910) in which the Court, on very different facts (*see* PB 23), stated that Section 371 includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Gov-

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"agency" of the federal government in administering the federal program. Here, however, the alleged conspiracy to defraud was against a *private corporation which was not administering a federal program* but was merely the recipient of a federally guaranteed loan *to be used in a non-federal construction project.* The government's leap from the imposition of Section 371 liability on a conspiracy to defraud a governmental agency administering a federal program to imposition of liability on a conspiracy to defraud a private corporation with tangential federal government connections is unwarranted. *See also United States v. Porter*, 591 F.2d 1048, 1055-58 (5th Cir.1979) (reversing Section 371 conviction on reasoning applicable here).

ernment," begs the question because the offense charged here was a conspiracy to defraud Seminole, which is not a "department [or agency] of Government."[6]

The government further concedes that not every conspiracy to defraud a private entity with some connection to the federal government is actionable under Section 371: "Section 371 *does not apply* to fraudulent conduct against any entity that receives *some amount* of federal financial assistance or is subject to *some form* of federal regulation" (GB 25) (emphasis supplied). Having conceded this, the government arbitrarily decides (without benefit of authority) that a conspiracy to defraud a private entity *can* become a conspiracy to defraud the United States within the meaning of Section 371 if there is "substantial ongoing federal supervision" of the private entity or "delegation [by the government] of a distinctly federal function" to the private entity (GB 25-26). The government's formulation is made up out of whole cloth, finds no support in the statute, the legislative history or prior decisions of this Court and should be rejected. *See supra* pp. 1-5.

Even accepting the government's criteria, there simply was no evidence of "substantial ongoing federal supervision" by REA of Seminole, nor did REA delegate "a distinctly federal function" to Seminole. Seminole is a

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[6] The government also sets up a strawman when it argues that it is not necessary under Section 371 to demonstrate either pecuniary loss to the government or to show a direct violation of a federal statute or regulation (GB 17-18). Petitioners have conceded this from the outset (PB 20, 28). Rather, petitioners contend that to convict under Section 371, the government must prove a conspiracy to defraud the *"United States or any agency thereof"* by (1) causing the government pecuniary loss; (2) violating a federal statute or regulation or (3) obstructing or interfering with the lawful function of a government agency (PB 28). *See Dennis v. United States*, 384 U.S. 855 (1966). Proof of a conspiracy to defraud a private entity with tangential government connections satisfies none of these criteria and is insufficient to prove a crime under Section 371.

private corporation owned by eleven rural cooperatives and was engaged in a non-federal construction project. The *only* federal government connection with the Seminole project was that Seminole borrowed construction funds which were guaranteed by REA. REA *did not* exercise any regulatory jurisdiction over Seminole (PB 17-18, n.6) and the contracts which were the subject of the alleged conspiracy did not require prior REA approval (PB 7-8).[7]

Similarly, the loan documents between REA and Seminole upon which the government heavily relies (GB 15-16)[8] merely gave REA the traditional rights of a lender/guarantor to protect its collateral. The loan documents *do* establish the relationship of REA, as guarantor, and Seminole, as borrower, but have nothing to do with the contracts between Seminole and Tanner's companies which were the subject of the alleged conspiracy. Certainly, there is nothing in the loan documents which constitutes the delegation by REA of a "distinctly federal function" to Seminole.

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[7] The government's argument that "at least one of the two contracts" awarded Tanner's companies required prior REA approval fails. The testimony cited by the government (GB 16) established at most that prior REA approval was required for a "transmission construction" contract and not for the fill dirt contract at issue here (J.A.44-45). And, when the defense attempted to introduce exhibits through the *same witness* to show that REA officials themselves questioned whether prior REA approval of Tanner's fill dirt contract was required, the trial court sustained the government's objection, finding the exhibits irrelevant (J.A.46-50). Additionally, as previously discussed in petitioner's main brief (PB 7-8, n.3), the trial judge excluded from evidence a subsequent letter from REA to Seminole which *conclusively* showed that prior REA approval of both of the contracts awarded to the Tanner companies *was not required* (J.A. 52).

[8] Significantly, the REA bulletin (J.A.77) upon which the government places much emphasis, was *excluded from evidence by the trial judge* who found it "not relevant to any issue in this case . . ." (J.A.50-51).

Finally, the government's attempt to show that REA engaged in "substantial ongoing federal supervision" of the Seminole project, collapses for lack of evidentiary support. The government bravely argues that REA's involvement in the contracts between Seminole and Tanner's companies was more than "theoretical" (GB 16), but supports this only with the weak assertion that "Seminole employees consulted an REA official on several occasions about the bidding procedures on [the Tanner] contracts." *Id.*[9] This is the *full extent* of the "substantial ongoing federal supervision" by REA which the government claims is necessary to convert the conspiracy to defraud Seminole into a conspiracy to defraud the United States. Thus, there was no evidence that REA "substantially" supervised Seminole vis-a-vis Seminole's contracts with Tanner's companies or that Seminole was carrying out a "distinctly federal function" concerning these contracts.

Moreover, the government suggests no basis upon which this Court, or lower courts, can determine when the federal supervision is "substantial" enough or when the function delegated is "distinctly federal" enough to render a conspiracy to defraud a private entity a conspiracy to defraud the United States under Section 371. Thus, in a futile attempt to sustain a Section 371 conviction in this case, the government would have this Court adopt a nebulous and unworkable definition of "conspiracy to defraud the United States," and then stretch the evidence beyond the breaking point to fit this new definition. The Court should reject this invitation, find the language of Section 371 itself controlling and reverse petitioners' convictions.

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[9] The "consultation" between REA and Seminole concerning these contracts consisted only of "recommendations" by an REA official about bidding procedures (J.A.24-28; 31-32).

C. If The Court Reverses Petitioners' Section 371 Convictions, It Should Also Reverse The Mail Fraud Convictions.

The government cannot have it both ways. In its brief concerning Section 371, the government argues mightily (and, we respectfully suggest, wrongly) that the conspiracy to defraud was not merely against a private entity but was, in fact, against the United States. When it seeks, however, to sustain the petitioners' mail fraud convictions, the government argues that the fraud committed against Seminole was a "private fraud" (GB 28, n.17).

Notwithstanding this, the mail fraud charges brought by the indictment (J.A.12-15) depended upon proof of a conspiracy to defraud the United States. Thus, if the Court reverses the Section 371 convictions, it should also reverse the mail fraud convictions as was done in the identical situation in *United States v. Porter*, 591 F.2d 1048, 1058 (5th Cir.1979).[10]

II

PETITIONERS ARE ENTITLED TO A HEARING TO DETERMINE WHETHER JURORS WERE RENDERED INCOMPETENT TO CONSIDER AND DECIDE THE CASE BY THEIR EXCESSIVE USE OF ALCOHOL AND DRUGS DURING THE PROCEEDINGS.

Implicit in the issue raised by the petition—whether sworn evidence that jurors were consuming large quantities of drugs and alcohol throughout the proceeding requires an evidentiary hearing in order to determine if defendants were afforded a fair trial—is the assumption

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[10] The government's reliance upon the jury instructions to differentiate between the Section 371 conspiracy to defraud the United States and the so-called "private fraud" against Seminole is misplaced because this Court has long held that the indictment governs the crime charged and a defendant may not be convicted of a crime which is not charged by the indictment. See *Stirone v. United States*, 361 U.S. 212 (1960).

(consistent with this Court's prior decisions) that under the sixth amendment, defendants are entitled to a trial before a jury "capable" of deciding the case on the evidence. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). In an attempt to deflect consideration of the issue raised, the government urges that because jurors are "ordinary citizens" (GB 28) their "privacy" should be protected; that this Court should rigidly enforce rules prohibiting "post-verdict interrogation of jurors" (GB 28-29) so as to protect jurors from juror "harassment and tampering" (*id.*); and therefore it should refuse to permit any inquiry which will determine whether jurors were rendered incapable of considering the evidence and rendering a verdict. While petitioners likewise revere the sanctity of the jury process and do not suggest wholesale intrusion into its deliberations, the egregious facts presented in this record clearly demonstrate that there are instances to which the shield of juror confidentiality must yield. As aptly noted by Justice Cardoza:

> "[A juror of integrity] will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. . . . [The privilege of confidentiality] must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." *Clark v. United States*, 289 U.S. 1, 16 (1933).

The government attempts to couch the question as one of "juror attentiveness during the trial," rather than juror "competency" (GB 47-48), and when referring to Dickens' *Pickwick Papers* (GB 33 n.19), facetiously suggests that if what one had for breakfast, or whether the juror argued with a spouse was deemed an "outside influence" so as to constitute an exception to the Rule, the exception would "swallow the rule" (GB 33).

While as stated, the argument is persuasive, it misses the mark. Petitioners are not contending that anything which "might affect the juror's mental processes" during the trial (GB 33)—whether lack of sleep, an argument with a spouse, a bad cup of coffee, or even consumption of alcohol—would constitute an "outside influence" so as to permit interrogation of a juror concerning the actions of another. Rather, petitioners contend that sworn evidence demonstrating that one juror has observed other jurors consuming alcohol and drugs in such quantities as to render them incapable of comprehending the evidence and deliberating a verdict requires an evidentiary hearing to determine competency.[11] Thus, it is "competency," not "inattentiveness," which is at issue. The sworn evidence here, if shown to be true at an evidentiary hearing, would render the jurors involved physically or mentally incapable of comprehending the evidence and arriving at an impartial verdict. Petitioners thus are not attempting to disqualify a "discontented or hungry" juror (GB 33 n.19), but one rendered physically or mentally incapable of affording a fair trial by the use of alcohol and drugs.[12]

Contrary to the government's position (GB 30), the common law rule emanating from Lord Mansfield's opinion in *Vaise v. Delaval*, 1 T.R.11, 99 Eng.Rep.944 (K.B.

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[11] Such persons would, of course, be initially disqualified from jury service under 28 U.S.C. § 1865(b)(4) (1982), which excludes from jury service any person "incapable, by reason of mental or physical infirmity, to render satisfactory jury service . . . ."

[12] Clearly, a juror taken suddenly and seriously ill during deliberations, or one who became insane or mentally afflicted would be disqualified from participating in the verdict. 3 D. Louisell and C.Mueller, Federal Evidence § 289 at 145 (1979).

1785), does not prohibit inquiry of the type here sought.[13] Neither does Rule 606(b), Federal Rules of Evidence, by its terms or its legislative history, prohibit inquiry to determine whether jurors were, by the use of alcohol and illegal drugs, rendered incompetent to hear and determine the case. To prohibit such an inquiry upon the facts here presented would be to vitiate the sixth amendment's guarantee of right to trial by a fair and impartial jury.

A. Rule 606(b) Does Not Exclude Evidence Of Juror Intoxication During The Course Of The Trial.

The legislative debate over adoption of Rule 606(b) centered not (as one might believe from reading the government's brief), on whether a juror might give testimony concerning another juror's intoxication during the proceedings, but rather, upon the ability of one juror to give testimony on the proceedings within the deliberations themselves, and, most importantly, the matter of quotient verdicts. *See generally* 3 J.Weinstein and M.Berger, Weinstein's Evidence §§ 606[01]-606[09] (1985); 3 D. Louisell and C.Mueller, Federal Evidence §§ 284-292 (1979).

The Advisory Committee on Rules of Evidence began with a narrow exclusionary definition which would have permitted liberal impeachment of verdicts by affidavits or testimony of jurors. Preliminary Draft of Proposed Rules of Evidence (March 1969), Rule 6-06(b), 46 F.R.D. 161, 289-290 (1969). As originally proposed, the Rule would have prevented jurors from testifying only as to the "effect of anything" on the "mind or emotions" of

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[13] As Wigmore notes [two sections following that cited by the government (GB 30)], certain kinds of misconduct constitute such an irregularity as to set aside the verdict; included "plainly are acts of intoxication . . . consultation of witness or party, acceptance of bribes . . . ." 8 J. Wigmore, Evidence § 2354 at 703 (McNaughton rev.ed. 1961).

a juror and the "mental processes" of jurors. It contained no exceptions. Thus, this Preliminary Draft would have allowed inquiry into whether the jury's determination was the result of a quotient verdict.

Apparently as the result of input from Senator McClellan and the Justice Department, the Advisory Committee introduced substantial changes into the Preliminary Draft of the Rule, which expanded the exclusionary definition to reach not only the "effect of anything" and the "mental processes" of jurors, but also "any manner or statement occurring during the course of the jury's deliberations."[14] However, the changed version, as ultimately proposed to and adopted by this Court and Congress, also introduced, for the first time, two crucial exceptions: Testimony or affidavits by jurors could be received on the question of (i) "whether extraneous prejudicial information was improperly brought to the jury's attention," or (ii) "whether any outside influence was improperly brought to bear upon any juror."[15] The latter exception does not appear in the Justice Department's recommendation.[16]

The House Subcommittee to which the new Rules were referred and ultimately the House Judiciary Committee sought a return to the original Preliminary Draft version of Rule 606(b). The assertion contained in the letter of Professor Carlson to the House Subcommittee to the effect

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[14] All of this is consistent with the memorandum submitted by Attorney General Kleindienst. *See* Letter from Deputy Attorney General Richard D. Kleindienst to Judge Maris (Aug. 9, 1971), *reprinted in* 117 Cong.Rec.33,648, 33,654-55 (1971).

[15] H.R. 5463, 93d Cong., 1st Sess., 119 Cong.Rec.21,405, 21,410 (1973).

[16] S.2432, 92d Cong., 1st Sess., 117 Cong.Rec.33,641, 33,655 (1971).

that the revised Rule would not allow inquiry into juror intoxication (cited in the government's brief at GB 36 n.21), is offered in support of his position to reinstate the original form of the Rule. The overall import of his letter centered not on this issue but on the question of whether quotient verdicts should be permitted.[17] Indeed, in a follow-up letter to Congressman Hungate after the House Committee reapproved the earlier version, the professor dropped any reference to the question of intoxication and mentioned only the matter of "quotient verdicts."[18] Similarly, debate on the House floor surrounding the adoption of Rule 606(b) centered on the quotient verdict issue.[19] To state, as the government does in its brief, that the single comment on this question (authored by Professor Carlson and carried forward by the House Report[20]) makes "clear" that the "Committee did not believe the exception for 'outside influence' in the Court's version of the rule permitted [testimony on the juror intoxication]" (GB 36-37), is to overstate the legislative history and draw an unwarranted conclusion from the exchange cited. We can find no evidence that any member of Congress addressed the question of whether the "outside influence" exception engrafted on the Rule prior to adoption would affect, one way or the other, the ability to inquire of a juror as to the

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17 *See Rules of Evidence, Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93d Cong., 1st Sess.389 (1973).

18 Letter from Prof. Carlson to Congressman Hungate (Apr. 16, 1973), *reprinted in Rules of Evidence (Supplement), Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93d Cong., 1st Sess.27 (1973).

19 Chairman Hungate summed up the debate on the issue by stating that "the Judicial Conference supported the *committee version in which we would seek to prohibit the quotient verdict . . . .*" 120 Cong.Rec.2,375 (Feb. 6, 1974) (emphasis added).

20 H.R.Rep.No.650, 93d Cong., 1st Sess.9-10 (1973).

drunkenness or incapacity of another juror.[21] Thus, the government's conclusion that the "legislative history of Rule 606(b) reveals that Congress . . . concluded that [evidence of juror intoxication] should not be allowed" (GB 34) cannot be substantiated.

Moreover, as noted in our main brief (PB 34 n.13), the treatises and cases which have subsequently addressed the issue indicate that the Rule, as adopted, *would* permit impeachment of a verdict by proof of influence on a juror, whether such influence be through the use of excessive amounts of alcohol, illegal drugs, or attempts at bribery (*see* PB 34). *See also* 3 D.Louisell and C.Mueller, Federal Evidence § 289 (1979):

> "[T]he present exception [of Rule 606(b)] paves the way for proof by the affidaivt or testimony of a juror that one or more jurors became intoxicated during deliberations. . . . Of course the use of hallucinogenic or narcotic drugs during deliberations should similarly be provable. . . ."

B. The Trial Judge Abused His Discretion In Refusing To Hold An Evidentiary Hearing.

The government strongly relies on the fact that defense counsel "claimed to have noticed jurors sleeping, but . . . failed to call the matter to the attention of the

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21 For example, the Senate Report suggested the House revision would permit testimony that jurors "refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations," but made no mention whether the exception would permit inqury as to drunkenness. S.Rep.No.1277, 93d Cong., 2d Sess.13 (1974). Likewise, the Conference Report, which advocated the Senate revision, noted that the "Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations . . . ," and concluded that "jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." S.Conf.Rep.No.1597, 93d Cong., 2d Sess.8 (1974).

court at the time" (GB 50), and that although the trial judge was in a position to observe the jurors in the courtroom, he stated that he "didn't see anybody sleeping" (J.A.168; GB 43). The trial judge's statement was not an observation made during the course of trial but, rather, an after-the-fact justification (made more than two months after the verdict) for *not* holding an evidentiary hearing (J.A.124, 168). And, while the trial judge at the post-trial hearing denied that defense counsel had informed him of jurors sleeping during the course of the proceedings, the trial transcript demonstrates that counsel *did* call to the trial judge's attention that jurors were sleeping through the afternoon sessions, and the trial judge made it clear to counsel that it was their responsibility, not his, to keep the jurors' attention (V.12:101). Thus, at the beginning of the afternoon session on March 1 (V.12:99), defense counsel approached the bench and informed the trial judge that he had "noticed over a period of several days that a couple of jurors in particular have been taking long naps during the trial" (V.12:100). The trial judge responded, "[m]aybe I didn't notice because I was—" (the balance of the trial judge's statement does not appear in the transcript) (V.12:100). The trial judge then made it clear that keeping the jurors interested and awake was counsel's "responsibility" and that he was "not going to sit here and watch" (V.12:101).

The government further attempts to avoid resolution of the merits of the question before the Court by contending the affidavit of Juror Hardy was improperly obtained. Rule 2.04(c), Local Rules, United States District Court for the Middle District of Florida, we respectfully submit, has no application to the facts of this case. It provides that where a party " 'believes that grounds for legal challenge to a verdict exists,' " he may then move for a court order " 'permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge.' " *Id.* (citation omitted). In the instant case, neither the petitioners nor their counsel were attempting to "interview" a juror or jurors so as to trigger application of the Rule. Here, defense counsel was at his home on a Saturday (J.A.241) when a juror approached him in the driveway of his home and told him that because these matters had been "on [his] mind for a long time" he was coming forward to tell him that the jury had conducted itself as though the proceeding was "one big party," had been drinking excessive amounts of alcohol during lunch breaks, and had "smoked marijuana together" during the proceedings (J.A.241-42).[22] Such an unsolicited approach, we respectfully suggest, does not trigger the provisions of the local rule relating to juror interviews.

More significantly—and noticeably absent from the government's brief—is the fact that *prior to approaching defense counsel at his home, Juror Hardy had telephoned the government prosecutor in the case to inform him of the consumption of alcohol during the trial (J.A.230).* This contact apparently triggered no investigation by the government to determine the factual basis of the information;

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22 The government also attacks the statement made by Juror Hardy that he and two other jurors drank a pitcher of beer each "within three hours of rendering a verdict in the case" (J.A.244), contending it should be discounted because "Hardy's affidavit does not confirm [the] account" as recited by Private Investigator Beard's affidavit (GB 44 n.27). But the record clearly shows that Hardy's oral statement was tape recorded on October 15, 1984 (J.A.205); two days later, Hardy read and signed the transcript of that prior oral statement before Beard (J.A.240), and on that occasion he made the further statement regarding the alcohol consumed prior to the deliberations (J.A.244). That Juror Hardy later recalled and recounted this additional important information to Beard is no basis for disregarding it.

nor was Juror Hardy's information disclosed to the court or defense counsel.[23] Certainly, while there are valid reasons for insulating jurors from harassment or intimidation or even from unsolicited questioning by parties or their counsels post-trial (and those have been, and are being, appropriately monitored by the local rules and the appropriate state bars), there is no basis for contending that when a juror voluntarily comes forward to inform defense counsel or the prosecution of improper, and in this instance, *illegal* conduct by jurors, that information should not be promptly and accurately transcribed and reported to the court for action.

If the government is correct and the local rule can be read to prevent a criminal defendant from making a proper preliminary showing in support of a motion for new trial based on jury misconduct, then such rule violates the provisions of the sixth amendment. In *Parker v. Gladden*, 385 U.S.363 (1966), the wife of a defendant, "unaware of any irregularities," began interviewing jurors more than two years after the verdict as a " '[shot] in the dark' " and discovered that a bailiff had made prejudicial comments to several jurors. *Id.* at 366 (Harlan, J., dissenting). This Court held these comments deprived defendant of his sixth amendment "right to a . . . trial, by an impartial jury," and reversed the conviction without

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[23] It is not mere speculation to suggest what action the government is likely to have taken had it learned of the information from Juror Hardy following a "not guilty" verdict, for in several reported decisions involving instances of much less extreme juror misconduct where "not guilty" verdicts had been rendered, the government has proceeded to investigate and then file criminal charges against the jurors involved. *See, e.g., Clark v. United States*, 289 U.S.1 (1933) (juror failed to reveal prior employment with corporation of which defendants had been officers); *United States v. Lampkin*, 66 F.Supp.821 (S.D.Fla.1946) (juror concealed prior conviction).

regard to the questions raised by the dissent as to the manner in which this information was obtained. *Id.* at 364-66.

The decision in *Parker* also disposes of the final argument made by the government in support of the lower court's decision—that the federal rule requiring a unanimous verdict in criminal cases provides a "margin of confidence," so that improper conduct by some, but not all jurors, does not require "close [judicial] scrutiny" (GB 49-50 n.35). Rejecting a similar argument in *Parker* (despite an Oregon law permitting a guilty verdict on 10 of 12 votes, 385 U.S. at 365), this Court noted that "petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id.* at 366.

Respectfully submitted,

Of Counsel:

DAVID R. BEST
BEST & ANDERSON
Suite 840
135 West Central Boulevard
Orlando, Florida 32801
(305) 425-2985

For Petitioner
Anthony R. Tanner

RICHARD A. LAZZARA
606 Madison
Suite 2002
Tampa, Florida 33602
(813) 229-2003

For Petitioner
William M. Conover

JOHN A. DeVAULT, III
Counsel of Record

TIMOTHY J. CORRIGAN
BEDELL, DITTMAR,
DeVAULT & PILLANS, P.A.
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211

Counsel for Petitioners